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 Before the
 Federal Communications Commission
 Washington, D.C. 20554

MM Docket No. 94-101

In the Matter of

Amendment of Section 73.202(b), RM-8510
 Table of Allotments,
 FM Broadcast Stations.
 (Kerman, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 12, 1996; Released: March 4, 1996

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 9 FCC Rcd 5232 (1994), issued in response to a petition filed by Valley Center Broadcasting ("petitioner") proposing the allotment of Channel 252A to Kerman, California, as that community's second local FM service. Petitioner filed supporting comments in response to the *Notice*.¹ Southeast Asian Broadcasting of Kerman ("Southeast Asian") also filed comments stating that it, or an affiliated entity will apply for Channel 252A if allotted to Kerman, as requested. Comments were also filed on behalf of EBE Communications Limited Partnership ("EBE") licensee of Station KNAX(FM), Channel 250B, Fresno, California.² Petitioner and Southeast Asian each filed reply comments.

2. The *Notice* herein proposed to allot Channel 252A to Kerman with a site restriction 0.7 kilometers (0.4 miles) south of the community at coordinates 36-43-05 and 120-03-55. The site restriction was proposed to avoid a short spacing to the licensed site of Station KNAX(FM), Channel 250B, Fresno, at coordinates 37-04-29 and 119-25-52.

3. In response to the *Notice*, EBE advises that the proposed allotment of Channel 252A to Kerman is mutually exclusive with its modification application (File No. BPH-9411141B) which, *inter alia*, proposes to relocate the transmitter of Station KNAX(FM) from its licensed site at Meadow Lakes, California, to an area closer to Fresno, utilizing coordinates 36-55-48 and 119-38-27, from which an improved service could be provided to the residents of Fresno and Madera Counties. EBE asserts that the proposed relocation of Station KNAX(FM) would result in the provision of a 70 dBu signal to 551,534 persons, representing a gain of +276%. Correspondingly, EBE advises that operation from its proposed site would provide a net gain in area coverage of 7% within its 60 dBu contour. EBE offers that unless an alternate channel is considered to accommodate the petitioner's desire to provide an additional FM service to Kerman, it will effectively preclude Station KNAX(FM) from regaining the degree of service it once provided to Fresno.³ In order to provide the opportunity for a second local FM service at Kerman, EBE offers that Channel 237A can be allotted to Kerman consistent with the requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited 11.0 kilometers southwest of the community.

4. EBE asserts that consideration of an alternate channel and site from that proposed in the *Notice* is consistent with the Commission's stated policy of attempting to eliminate conflicts between a rulemaking petition and a later-filed FM application where possible to do so without prejudice to the affected parties, citing *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments* ("Conflicts"), 8 FCC Rcd 4743, 4745 N.12 (1993). EBE remarks that consideration of Channel 237A in lieu of Channel 252A at Kerman will not prejudice either party. Rather, EBE remarks that it will simply remove the existing conflict with its pending modification application, thereby providing Station KNAX(FM) an opportunity to provide an improved service to the residents of Fresno, while simultaneously accommodating the interests expressed in providing a new FM service at Kerman.

5. In responsive comments, petitioner and Southeast Asian each object to EBE's request to allot Channel 237A to Kerman instead of Channel 252A, alleging that the channels are not equivalent. Southeast Asian avers that the 11 kilometer site restriction southwest that is required to accommodate Channel 237A would amount to an inefficient use of the spectrum compared to the minimal site restriction demanded for Channel 252A. Petitioner believes that as EBE is attempting to impose both a site restriction

¹ As stated in the *Notice*, petitioner's request, although signed and its address provided, failed to include an affidavit verifying statements contained in its petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in its responsive comments and has complied accordingly.

² Although EBE's comments were styled as "Comments and Counterproposal", they have not been treated as a counterproposal. A counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made. See, e.g., *Implementation of BC Docket 89-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931 (1990). In this instance EBE's comments contained a settlement suggestion of an alternate channel for allotment at Kerman to resolve the mutual exclusivity that exists between the instant rule making

petition and EBE's subsequently filed minor change application, which is discussed *infra* at paragraphs 3-4.

³ EBE advises that it previously operated from a site within Fresno until forced to move approximately six years ago, at which time it relocated to an antenna farm 49 kilometers northeast of Fresno. However, EBE remarks that service to Fresno from its currently licensed site has proven to be minimal. While the continued operation of Station KNAX(FM) at its licensed site at Meadow Lakes enables Channel 252A to be considered for allotment to Kerman, as recognized by the site restriction proposed for Channel 252A in the *Notice*, EBE avers that unless another channel is considered at Kerman, that allotment would forever preclude Station KNAX(FM) from providing an improved service to Fresno from the site specified in its modification application.

and an alternate channel at Kerman, its proposal is inconsistent with the Commission's stated policy in *Conflicts, supra*.⁴ Petitioner avers that EBE's proposal, if adopted, will prejudice future applicants at the underserved community of Kerman in favor of Fresno, which contains a multiplicity of licensed aural services.

6. In further support of its position, petitioner claims that the site restriction for Channel 237A will affect the financial viability of the proposed new Kerman facility in several ways. Not only will it greatly reduce the flexibility of applicants to secure a transmitter site, and add significantly to the costs of erecting the necessary physical structures, but would reduce the potential population coverage as the specified site is in a more sparsely populated area. Petitioner claims that conversely, a transmitter for Channel 252A could be located on one of two existing tower structures in a more densely populated area, thereby eliminating many extra costs that would be required for Channel 237A, and would enable a future station to provide service to a larger segment of the population. Moreover, petitioner claims that environmental considerations do not surround Channel 252A. Specifically, petitioner asserts that the area indicated to accommodate a transmitter for Channel 237A may be environmentally sensitive, referring to the California Native Species Act, as the reference coordinates are adjacent to the Kerman Ecological Reserve, a refuge for several endangered species such as the San Joaquin Kit Fox, Bluntnose Leopard Lizard, Fairy Shrimp, and the Fresno Kangaroo Rat, all of which are Federally protected. Petitioner adds that not only would the restricted area for Channel 237A subject potential applicants to land use restrictions, zoning issues, and environmental concerns, but it would also result in the loss of agricultural land production in violation of the State of California's Environmental Quality Act, and would place another aviation hazard in an area used extensively by aircraft for crop dusting.

7. Petitioner remarks that while it opposes consideration of Channel 237A at Kerman for the reasons enumerated above, it would not object to the substitution of an alternate FM channel at Kerman had one been available that equalled its original proposal. Petitioner urges that as its proposal would provide a new local transmission service to Kerman, the public interest would be better served by allotting FM Channel 252A to Kerman, rather than affording protection to EBE's application, as Station KNAX(FM) is said to provide the required coverage of the City of Fresno from its licensed site.⁵

8. Preliminarily, we address the petitioner's and Southeast Asian's objections to the consideration of alternate Channel 237A at Kerman. We disagree with the petitioner's view that the suggested use of alternate Channel 237A

at Kerman is inconsistent with the Commission's stated policy in *Conflicts, supra*, since it also requires a site restriction. Petitioner appears to apply a literal interpretation to our cited policy. The *Conflicts* item should not be construed as narrowly applying the Commission's remedial measures to eliminate inconsistencies between coordinates specified by applicants and those designated in rulemaking proceedings by modifying the rulemaking proposal to specify either an alternate site or channel where possible. Rather, it has been, and continues to be the Commission's policy to consider whichever allotment plan it determines to be more conducive to serving the public interest. It is not required to allot the preferred numerical channel of any specific party. See the Appendix to the Notice. Moreover, while the Commission endeavors to allot the least restrictive channel possible, we must be guided by the overall public interest benefits to be attained by the proposals under consideration.

9. In this instance, we believe that Channel 237A is equivalent to Channel 252A for allotment purposes. We realize that while no two channels are ever exactly the same, the Commission considers channels to be equivalent provided they are of the same class distinction, would comply with the minimum spacing criteria, and would enable a broadcast facility to provide 70 dBu coverage to the proposed allotment community. See *Vero Beach, Florida*, 3 FCC Rcd 1049 (1988), *rev. denied*, 4 FCC Rcd 2184, 2185 (1989). Additionally, we indicated in *Vero Beach* that we would consider other pertinent factors which might preclude a finding of channel equivalency. Such factors could include environmental effects or aeronautical hazards which would prevent a station from constructing on that channel. While petitioner claims that the area to accommodate Channel 237A is near the Kerman Ecological Reserve, perhaps invoking environmental and zoning issues, as well as possibly invoking an air hazard concern, we find those allegations are speculative. Petitioner has provided no showings or testimony from local zoning officials or environmental groups to substantiate that a station could not be constructed on Channel 237A within the fully spaced area specified in EBE's comments to accommodate the allotment. In any event, environmental assessments may be explored at the application level pursuant to the requirements of Sections 1.1307 and 1.1308 of the Commission's Rules to determine whether proposed facilities at a particular site may significantly affect the environment. Moreover, petitioner failed to present documented information indicating that there are no suitable sites available to accommodate a tower for Channel 237A consistent with applicable FAA criteria. The determination as to the availability of a transmitter site to comply with FAA technical considerations may be explored at the application stage

⁴ To substantiate its assertion, petitioner quotes n.12 of *Conflicts, supra*, as follows:

"The staff will also attempt to resolve conflicts between a rulemaking petition and a later-filed FM application by imposing a site restriction on the proposal in the petition, or by allotting an alternate channel for that proposed in the petition, whenever it is possible to do so without prejudice to a timely filed FM application or rulemaking petition."

⁵ Petitioner's comments also address the past engineering studies performed by EBE to demonstrate compliance with Section 73.315 of the Commission's Rules with respect to Fresno from

the currently licensed site of Station KNAX(FM) at Meadow Lakes. Although petitioner urges that EBE's current claim of dissatisfaction with the coverage provided to Fresno from that site is an attempt to attain greater interference protection via its application while simultaneously attempting to impede the addition of another aural broadcast service, these are application matters and need not be considered here. Moreover, as EBE has suggested an alternate Class A channel for allotment to Kerman, we do not view the filing of its modification application as an attempt to hinder the addition of a new local transmission service to that community.

when the actual site proposal is before the Commission for consideration. See *West Palm Beach, Florida*, 3 FCC Rcd 5810 (1988); *recon. denied*, 6 FCC Rcd 6975 (1991).

10. With respect to the petitioner's allegation concerning the impact the alternate channel would have on the financial viability of the proposed new Kerman facility, economic feasibility issues are not presently considered by the Commission in the allotment or licensing context. See *FM Channel Assignments; Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied*, 4 FCC Rcd 2276 (1989); *Cheyenne, Wyoming*, 8 FCC Rcd 4473 (1993); and *Albion, Nebraska*, 10 FCC Rcd 3183 (1995), *rev. denied*, 10 FCC Rcd 11927 (1995).

11. In consideration of the above, we believe that the public interest would be served by allotting Channel 237A to Kerman as that community's second local transmission service, since petitioner has not sufficiently demonstrated the superiority of Channel 252A, as proposed in the *Notice*. Moreover, the allotment of Channel 237A to Kerman will enable EBE to relocate the transmitter for Station KNAX(FM) to the site designated in its modification application (BPH-941114IB) at coordinates 36-58-48 and 119-38-27, thereby affording it the opportunity to provide an improved service to Fresno and its environs.

12. Channel 237A can be allotted to Kerman consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules provided the transmitter therefor is located at least 11.7 kilometers (7.3 miles) southwest of the community, utilizing coordinates 36-41-00 and 120-10-48. The site restriction is required to avoid a short spacing to the licensed site of Station KJFX(FM), Channel 239B, Fresno, at coordinates 36-56-55 and 119-29-09.

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 18, 1996**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Kerman, California, as follows:

City	Channel No.
Kerman, California	232A, 237A

14. The window period for filing applications for Channel 237A at Kerman, California, will open on **April 18, 1996** and close on **May 20, 1996**.

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

16. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 237A at Kerman, California, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau